

INDONESIA LEGAL ANALYSIS OF IUU FISHING AND TRANSNATIONAL ORGANIZED FISHERIES CRIMES: LOOPHOLES AND PROPOSED MEASURES

Zaki Mubarok

University of Wollongong, Australia
Correspondence: zm169@ouwmil.edu.au

Abstract

The fight against illegal fishing by the Ministry of Marine Affairs and Fisheries has taken off. When investigating Illegal, Unreported and Unregulated (IUU) fishing, related transnational crimes activities such as trafficking in persons, slavery and drugs are also uncovered. In spite of the robust efforts and prompt responses, some challenges persist in terms of the inadequacy of legal frameworks governing these problems. Thus, the adequacy of the legal domain is a significant factor in pursuing the Ministry's mission. The legal framework plays a pivotal role in addressing IUU fishing and transnational organized fisheries crimes and in setting a mechanism to prevent further expansion of these activities. In developing an in-depth analysis of the nexus between IUU fishing and transnational organized crimes, the two dimensions of intertwined national and international legal frameworks need to be examined. This article attempts to examine the existing Indonesian legal framework to combat IUU fishing and fisheries crimes within the context of relevant national and international laws and provide a critical discussion of the interplay between IUU fishing and transnational organized crimes.

Keywords : Indonesia, IUU Fishing, Fisheries Crimes, Legal Framework and Transnational Organized Crimes

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I. INTRODUCTION

Indonesia Ministry of Marine Affairs and Fisheries measures to fight Illegal, Unreported, and Unregulated Fishing (IUU Fishing) continue to be important in sustaining and conserving Indonesia's marine resources. The ministry's persistence is understandable, given that Indonesia faces a severe problem in terms of illegal fishing. One report has depicted the detrimental effects of illegal fishing on the economy, the environment, and the livelihood of small-scale fishers.¹

Indonesia's coral reefs are regarded as being 65 percent threatened as

¹ Ministry of Marine Affairs and Fisheries, International Organization for Migration and Coventry University, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesia Fishing Industry* (Jakarta: IOM, 2016), available at <https://www.iom.int/sites/default/files/country/docs/indonesia/Human-Trafficking-Forced-Labour-and-Fisheries-Crime-in-the-Indonesian-Fishing-Industry-IOM.pdf>, 11.

a result of overfishing practices. Illegal and unreported fishing has resulted in Indonesia losing some US\$ 20 billion in revenue, and the poverty rate in coastal areas also remains high.² Illegal fishing impinges heavily upon small-scale fishers living in coastal areas due to the decline of fish stocks. As a consequence of overfishing, Indonesians have less interest in fishing as an occupation, in particular, in traditional fishing. Data from the Central Bureau of Statistics of Indonesia indicates that the number of traditional fishers has experienced a decrease from 1.6 million to 864,000 between 2003 and 2013.³

In general, as revealed by Telesetsky, countries have regarded IUU fishing as a management problem of fishery resources rather than as an egregious crime.⁴ Nonetheless, increased complexity in the fisheries sector also comes from organized crime, showing that illegal fishing involves more than just the resources management problem *per se*. Transnational crimes such as human trafficking and people smuggling occur in Indonesia's fishing industry. Chan reported that the Indonesian navy seized the 'FV Sunrise Glory,' a fishing vessel that was attempting to smuggle one tonne of crystal methamphetamine concealed in 41 sacks of rice off Batam Island. When boarded and inspected, the vessel was flying the Singapore flag. However, further investigation revealed that this vessel had changed its flag ('reflagging'), given that the Indonesia navy also discovered a Taiwanese flag on board.⁵

Indonesia has shown a prompt response in addressing fish poaching through the imposition of stringent measures, including the burning and/or sinking of illegal fishing vessels. The former Minister Susi has chosen to publicize the sinking measure through the media, thus putting aside the traditional ASEAN way of combatting IUU Fishing. This ASEAN Way principle emphasizes consultation and dialogue as well as non-interference to domestic issues of ASEAN members.⁶ Schonhardt revealed that sinking such vessels during the commemoration of national public holidays such as Indonesia's Indepen-

² Sri Mulyani, "the Case for Inclusive Green Growth," World Bank, 9 June 2015, accessed _____ <http://www.worldbank.org/en/news/speech/2015/06/09/the-case-for-inclusive-green-growth>. Sri Mulyani holds the position as Minister of Finance of Indonesia prior to and post joining the World Bank. This statement was delivered in the Indonesia Green Infrastructure Summit in Jakarta.

³ MMAF, International Organization for Migration and Coventry University, *Report on Human Trafficking*

⁴ Anastasia Telesetsky, "Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime" *Ecology Law Quarterly* 41, no. 4 (2014): 943. The article tests a legal framing theory by arguing that insufficient attention has been given to understanding large-scale IUU fishing as a transnational organized criminal activity.

⁵ Francis Chan, "Taiwanese Crew under Probe for Operating under False Flags for Illegal Fishing, Drug Smuggling," *The Strait Times* (Singapore), 11 February 2018, <http://www.straitstimes.com/asia/se-asia/1-tonne-of-crystal-meth-seized-from-boat-off-batam>.

⁶ Hiro Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"" *Contemporary Southeast Asia* 25 (2003): 104.

dence Day sends a message to other countries to respect Indonesia's territory.⁷

Between 2014 and April 2017, MMAF reported the authorities had sunk a total of 317 illegal fishing vessels from other countries, including the "FV *VIKING*, a notorious stateless vessel sought worldwide by INTERPOL and 13 countries". The most significant number of fishing vessels have belonged to Viet Nam, which accounted for 142, followed by the Philippines (76), Malaysia (49), Thailand and Indonesia (both 21), Papua New Guinea (2), one from Belize, one from China and 4 stateless vessels (Figure 1).⁸ Nevertheless, this robust measure did not completely stop poachers from breaching Indonesia's national and international laws and regulations.⁹

Figure 1:
Illegal Fishing Vessels Sunk by Indonesia Authorities from 2014–April 2017¹⁰



Legal issues come to the fore as the main element in examining and addressing this complicated problem. This paper examines the legal approach to IUU fishing and transnational organized fisheries crimes or fisheries crimes. It begins by presenting an overview of relevant domestic laws and regulations. This article raises some legal issues and proposes a number of efforts to solve the problems. The paper identifies the conceptual challenges concerning the interplay between IUU fishing and Transnational Organized Crime (TOC). This article suggests that Indonesia needs to consent to be bound by related international conven-

⁷ Sara Schonhardt, 'Indonesia Sinks 60 Fishing Boats on Independence Day', *the Wall Street Journal* (online), 17 August 2016, <http://www.wsj.com/articles/indonesia-sinks-60-fishing-boats-on-independence-day-1471428634/>.

⁸ MMAF, "Laut Masa Depan Bangsa: Kedaulatan, Keberlanjutan dan Kesejahteraan (Ocean is the Nation's Future: Sovereignty, Sustainability and Prosperity)" (White Paper, 2017), 42.

⁹ Adiatmaputra Fajar Pratama, "Meski Sudah Banyak Ditenggelamkan, Kapal Pencuri Ikan Masih Banyak Bermunculan (Although Fish Poacher Vessels Have Been Sunk, They still Come)," *Tribun News* (online), 12 January 2018, <http://www.tribunnews.com/nasional/2018/01/12/meski-sudah-banyak-ditenggelamkan-kapal-pencuri-ikan-masih-bermunculan>.

¹⁰ MMAF, "White Paper," 2017.

tions such as the 1993 FAO Compliance Agreement and the 2012 Cape Town Agreement. It is worth noting further that the U.S has strong laws punishing its nationals who are found to be involved in IUU fishing and such laws can be a mirror. This paper concludes by proposing some recommendations to address loopholes.

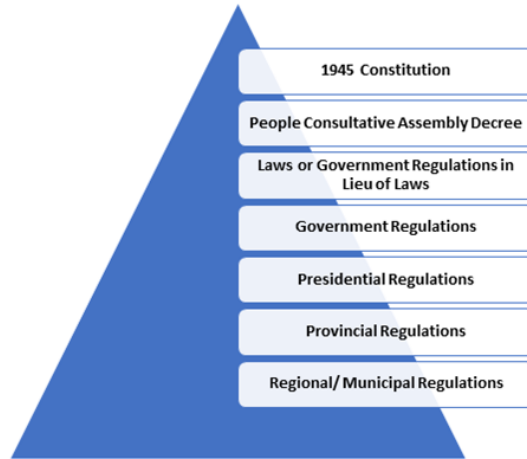
II. INDONESIA'S LEGAL FRAMEWORK IN ADDRESSING IUU FISHING AND TOC

Legal instruments play a key role in ensuring the conservation and management of living marine resources from degradation, particularly in terms of the depletion of fishery resources. As an umbrella law, the 1945 Constitution of Indonesia reads “Land and water and natural resources therein shall be controlled by the State and shall be utilized for the greatest benefit of or welfare of the people” (art. 33(3)).¹¹ In this article, the government asserts a mandate to explore natural supplies, including marine resources for the people’s prosperity. In other words, the state is obliged to preserve resources from deterioration to make them beneficial to the Indonesian people.

In the domestic legal system, the 1945 Constitution occupies the role of the supreme law and is followed by the People’s Consultative Assembly Decrees (Law Number 12/2011 concerning the Formulation of Laws and Regulations, art. 7). Figure 2 depicts the hierarchy of Indonesia’s laws and regulations in accordance with Article 7(1):

Figure 2: The Hierarchy of Indonesia’s Laws and Regulations

¹¹ Indonesia, *Undang-Undang Republik Indonesia tahun 1945* [the Constitution of the Republic of Indonesia 1945] (Indonesia) art 33 (2) [Simon Butt].



Indonesia pays particular attention to fisheries through its domestic laws and regulations. The primary legal instrument governing fisheries resources is Law No. 45/2009 as an amendment to Law No. 31/2004 concerning Fisheries (hereinafter referred to as the Fisheries Law). The lower position of laws in comparison to the 1945 Constitution in the hierarchical system leads to the provisions governed in the laws shall not in contravention of the Constitution. The Fisheries Law addresses, among others, the challenges of new technology, better coordination between related institutions involved in fisheries management, and “matters of jurisdiction and the competency” of courts in the regional level with regard to their authority in prosecuting crimes related to fishing outside their previous traditional authority. Further, it aims also to engage local administrations.¹² Gregory Rose is of the view that the Fisheries Law does not govern the technical aspects of fisheries. Other issues of fisheries such as fishing vessel registration and licensing, the licensing of fisheries businesses, and fish monitoring systems, are regulated under ministerial regulations, ministerial decrees, governmental regulations,¹³ and director-general decrees.

Under the Money Laundering Law, assets are classified to be proceeds of crime if they are acquired from such illegal activities as corruption, environmental crime, marine and fishery crimes, or any other crimes incurring

¹² Conservation and Community Investment Forum, *Indonesia Country Report Assessment of the Enabling Conditions for Rights-Based Management of Fisheries and Coastal Marine Resources* (Trust for Conservation Innovation, 2013) http://www.trustforconservationinnovation.org/sponsored/inc/CCIF_Indonesia_web.pdf.

¹³ Gregory Rose, “Combating Transnational Environmental Crime: Future Direction” in *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre*, Gregory Rose, ed. (Routledge, 2014), 104.

imprisonment for four years or more.¹⁴ Perpetrators of criminal acts tend to conceal money and assets acquired from their criminal activities in order that authorities find it difficult to trace such assets. Anti-money laundering assists in identifying perpetrators and their illegal assets through a tracing mechanism. By confiscating illegal assets and detaining criminals, crime rates can be diminished. This principle also applies to assets resulting from illegal fishing and fisheries crimes.

In terms of punishment, Law Number 8/2010 incurs imprisonment for up to twenty years and a fine up to ten billion rupiahs for those committing money laundering (art. 3). Differing degrees of punishment apply depending on the gravity of the crime. Moreover, if the crime is committed by a corporation, the sentence shall be levied on the corporation and/or personnel controlling the corporation (Law Number 8/2010, art. 6). A fine of up to one hundred billion rupiahs is imposed on the corporation as a primary sentence. An independent institution, the Financial Transaction Report and Analysis Centre (PPATK), was established by the Indonesian Government to prevent and eradicate money laundering (Law Number 8/2010, art. 37).

III. LEGAL ANALYSIS OF IUU FISHING BY INDONESIAN FISHING VESSELS ON THE HIGH SEAS

Increasing human exploration of the oceans has led to international bodies managing such activities. As one of the oldest branches of public international law, Tanaka conceived that the international law of the sea plays a pivotal role in managing the ocean through its legally binding character.¹⁵ Two legally binding international instruments can be used as significant “toolkits” to overcome IUU fishing and fisheries crimes: the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the 1993 Food and Agriculture Organization (FAO) Compliance Agreement), and the Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977 (the 2012 Cape Town Agreement).

The former Agreement has the objective of enforcing “the effectiveness of international fisheries conservation and management measures” which is de-

¹⁴ *Undang-Undang Nomor 8 tahun 2011 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang* [Law No. 8/2010 on Countermeasures and Eradication of Money Laundering] (Indonesia) art 2 [author’s trans] (‘Indonesia Money Laundering Law’).

¹⁵ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 3.

signed specifically to fill a legal gap in fisheries reflagging,¹⁶ while according to Sack, the latter Agreement emphasizes the protection of laborers on fishing vessels.¹⁷ Indonesia is a State Party to neither the 1993 Compliance Agreement nor the 2012 Cape Town Agreement. The FAO Compliance Agreement was adopted on 24 November 1993 and entered into force on 24 April 2003¹⁸ while the Cape Town Agreement has not yet entered into effect as minimum number of states expressing consent to be bound by this agreement has not been reached to allow it to come into force.

Fishing vessels flying the Indonesian flag contribute to illegal fishing on the high seas. In Figure 3, Indonesia was ranked in 6th position as a flag state conducting Illegal fishing (16 fishing vessels).¹⁹ There is a small gap to Panama (20 fishing vessels), a “flag hopping state”²⁰ and is even higher than China (5 fishing vessels) which has the biggest fishing fleet in the world.²¹ However, this report clarifies further that vessels can be registered in more than one state when conducting illegal fishing.²² Figure 3 illustrates the highest number of flag states engaging in illegal fishing were stateless or did not have a known flag (73 fishing vessels). The data was taken from lists of IUU fishing published by Regional Fisheries Management Organizations and Purple Notices published by INTERPOL.²³ This report sheds some light concerning the intricacy of enforcing the law on perpetrators responsible for committing fisheries crime.

Figure 3. Flag States of Fishing Vessels Involved in Illegal Fishing based on the report by INTERPOL, North Atlantic Fisheries Intelligence Group, NORAD and Nordic Council of Ministers²⁴

¹⁶ William Edeson, David Freestone and Elly Gudmundsdottir, *Legislating for Sustainable Fisheries: A Guide to Implementing the FAO Compliance Agreement and 1995 UN Fish Stocks Agreement* (the World Bank, 2001) 2.

¹⁷ Karen Sack, ‘Slavery at Sea: the Human Cost of Illegal Fishing’, Huffington Post (online), 31 July 2016, http://www.huffingtonpost.com/ocean-unite/slavery-at-sea-the-human-_b_7912334.html.

¹⁸ David Balton, ‘The Compliance Agreement’ in *Development in International Fisheries Law* Helen Hey, ed. (Kluwer Law International, 1999), 34. As of 14 October 2014, 40 countries had expressed their consent to be bound by the Compliance Agreement by means of acceptance.

¹⁹ The North Atlantic Fisheries Intelligence Group (NAFIG), *Chasing Red Herrings: Flag of Convenience, Secrecy and the Impact on the Fisheries Crime Law Enforcement* (NAFIG, 2017), 52-53.

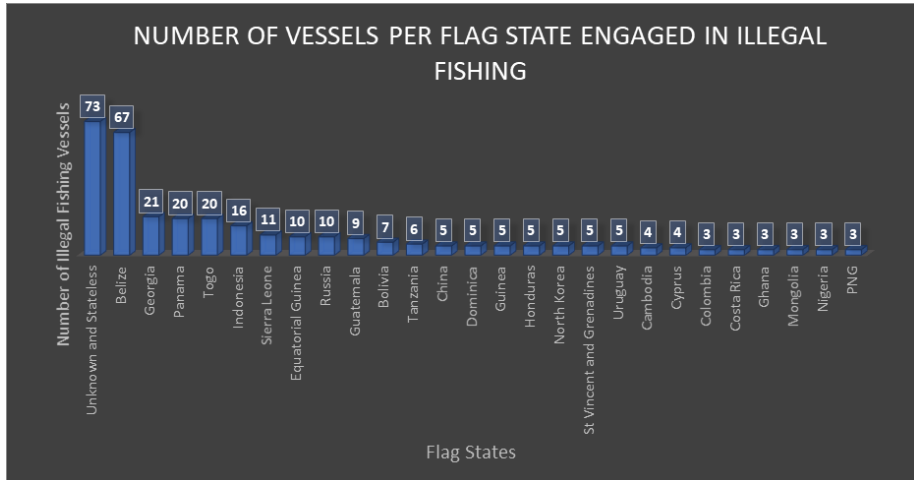
²⁰ International Transport Workers Federation, ‘Flags of Convenience: Avoiding the Rules by Flying a Convenient Flag,’ ITWF, 2018, para. 20., <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>.

²¹ Hongzhou, ‘China’s Fishing Industry: Current Status, Government Policies, and Future Prospects’ (Paper presented at China as a Maritime Conference, Arlington, Virginia July, 2015) 1.

²² NAFIG, *Chasing Red Herrings*, 73.

²³ *Ibid.*, 47.

²⁴ NAFIG, *Chasing Red Herrings*, 52-53.



Indonesia makes itself available as far as possible in preventing and punishing its fishing vessels when they commit illegal fishing on the high seas through legal mechanisms. Ministerial Regulation Number 12/2012 entitled Capture Fisheries Business on the High Seas (*Usaha Perikanan Tangkap di Laut Lepas*) requires that fishing vessels flying the Indonesian flag shall comply with certain provisions designed to prevent and punish Indonesian fishing vessels undertaking illegal fishing.²⁵ Some articles in the Fisheries Law and Ministerial Regulation Number 12/2012 are found to have the same arrangements as in the Compliance Agreement. However, since Indonesia has not agreed to be bound by the Agreement, some provisions in Ministerial Regulation 12/2012 are neither consistent with, nor regulated under, the Agreement.

Under international law, it is imperative for fishing vessels “to exercise effectively its jurisdiction and control over vessels flying its flag, including fishing vessels and vessels engaged in the transshipment of fish.”²⁶ The practice of flagging and reflagging is identified as one of the factors undermining international conservation and management measures for living marine resources.”²⁷ The Agreement covers state responsibility, including “genuine link”²⁸ and the recording of fishing vessels.²⁹ Under the Indonesia Fisheries Law, the genuine

²⁵ Ministry of Marine Affairs and Fisheries of Indonesia, “Indonesia Annual Report to the Ecologically Related Specie Working Group (ERSWG) for 2012” (MMAF Report, Jakarta, 2013), available at https://www.ccsbt.org/en/system/files/resource/en/52145ef6bb540/ERSWG10_AnnualReport_Indonesia.pdf.

²⁶ *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* adopted on 24 November 1993, 2221 UNTS (entered into force 24 April 2003), Preamble (‘the 1993 FAO Compliance Agreement’).

²⁷ *Ibid.*

²⁸ *Ibid.*, art III(2).

²⁹ *Ibid.*, art IV.

link has been regulated under Article 63. In this provision, fishing vessels owned by Indonesian individuals are to be registered as Indonesian fishing vessels when operating in the Fisheries Management Area of Indonesia and on the high seas.³⁰ If the fishing vessels are purchased from overseas, a document of release published by the original flag state shall be lodged for registration.³¹ Such registration also serves as a record of the fishing vessels. As a non-party to the Agreement, Indonesia is encouraged to adopt laws and regulations consistent with the provisions of the Agreement.³²

The Compliance Agreement provisions are intended to apply to all fishing vessels undertaking activities on the high seas with an exemption for fishing vessels of less than 24 meters.³³ Ministerial Regulation 12/2012 only governs fishing vessels of a minimum 30 gross tonnage and having at least 15 meters LOA (Length Overall).³⁴ It is also important to highlight that as a non-member state of the Compliance Agreement,³⁵ it is not mandatory for Indonesia to exchange information³⁶ and to be part of international cooperation³⁷ with developing countries under the Agreement.³⁸ As of October 2018, 42 states have become Parties to the Compliance Agreement.³⁹ Despite the limited number of acceptances to the Agreement, Indonesia suffers a potential loss in not cooperating with Parties to the Agreement in terms of the exchange of information, including evidentiary materials regarding activities of fishing vessels which help flag states to recognize fishing vessels reported to have been involved in activities undermining international conservation and management efforts.⁴⁰

The cooperation also occurs for port states in promptly notifying flag states and in launching an investigation when their fishing vessels have been used for activities that “undermines the effectiveness of international conservation and management measures” where there are reasonable grounds to believe that the fishing vessels have engaged in such measures.⁴¹ Indonesia may use this

³⁰ Indonesia, *Peraturan Menteri Kelautan dan Perikanan Republik Indonesia Nomor 12/PERMEN-KP/2012 tentang Usaha Perikanan Tangkap* [Minister of Marine Affairs and Fisheries Regulation Number 12/PERMEN-KP/2012 on Capture Fisheries Business], art 36(1) (‘Indonesia Capture Fisheries Business Ministerial Regulation’).

³¹ *Ibid* art 36(3).

³² *The 1993 FAO Compliance Agreement* art VIII(1).

³³ *Ibid* art II.

³⁴ *Indonesia Capture Fisheries Business Ministerial Regulation* art. 3(3).

³⁵ *The 1993 FAO Compliance Agreement* art VIII.

³⁶ *Ibid* art VI.

³⁷ *Ibid* art V.

³⁸ *Ibid* art VII.

³⁹ United Nations, *Status of Treaties: Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (2018) <<https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>>.

⁴⁰ *The 1993 FAO Compliance Agreement* art V(1).

⁴¹ *Ibid.*, art V(2).

provision when their fishing vessels are in contravention of Article III concerning flag state responsibility if it consents to be bound by the Agreement. Furthermore, as a developing state, Indonesia can also receive assistance, including technical assistance to fulfil the obligations under the Agreement if Indonesia becomes a State Party.⁴² It is evident that the problem of fishing vessels flying the Indonesian flag committing illegal fishing on the high seas arises from a variety of reasons. From an international legal framework point of view, the Compliance Agreement can be used as a tool to diminish illegal fishing practices on the high seas inasmuch as it provides mechanisms to curb activities that are inconsistent with international conservation and management measures. Indonesia's consent to be bound by this Agreement creates an image as a sustainable fisheries nation that Indonesia has been attempting to establish globally.

Another treaty that is significant in preventing illegal fishing and TOC on the high seas is the 2012 Cape Town Agreement. This agreement was adopted by the IMO, and it brings the main mission to enhance "the standard of design, construction and equipment, including safety protections, of fishing vessels 24 metres or more in length. The agreement also outlines regulations for crew and observer protections and calls for harmonized inspections, those that consider fisheries, labour, and safety issues".⁴³ The Cape Town Agreement of 2012 updates and amends the Torremolinos International Convention (the Convention) for the Safety of Fishing Vessels of 1977 and the 1993 Torremolinos Protocol (the Protocol). The Convention has been twice amended previously while the Protocol has updated and amended the Convention in view of technological progress since 1977.⁴⁴ The International Labour Office (ILO) notes that the International Convention for the Safety of Life at Sea, 1974 as amended (the SOLAS Convention) is the most important legal instrument to enhance the safety of life and vessels at sea, but fishing vessels are generally exempted from SOLAS. The Protocol deals with this gap by regulating the safety of fishers' lives at sea. The status of the Protocol has not come into force, except for European Union members through the adoption of Directive 97/70/EC of 11 December 1997.⁴⁵

The condition for this agreement to come into force is "12 months after the date on which not less than 22 states the aggregate number of whose fish-

⁴² *Ibid.*, art VII.

⁴³ The PEW Charitable Trusts, "The Cape Town Agreement: 7 Reasons to Improve Safety on Fishing Vessels: A Brief" (Brief Paper, 2017), https://www.pewtrusts.org/-/media/assets/2017/10/eifp_the_cape_town_agreement.pdf, 3.

⁴⁴ Ministry of Transport of New Zealand, "Cape Town Agreement of 2012" (Discussion Paper, April 2015), 3.

⁴⁵ ILO, *Caught at Sea: Forced Labour and Trafficking in Fisheries* (Geneva: ILO Publication, 2013), 33.

ing vessels of 24 m in length and over operating on the high seas is not less than 3,600 have expressed to be bound by it".⁴⁶ This threshold is lower than the conditions set in the Convention and the Protocol in order to achieve more consent by states. Technical arrangements of the Agreement will apply to new fishing vessels of a length of at least 24, 45 and 75 metres. However, some articles will apply only to existing fishing vessels of at least 24 and 45 metres.⁴⁷ As of 20 March 2018, nine countries have ratified the Cape Town Agreement (Congo, Denmark, France, Germany, Iceland, Netherlands, Norway, Saint Kitts and Nevis and South Africa) along with 1144 fishing vessels of at least 24 meters.⁴⁸ A minimum number of states expressing consent to be bound by this agreement has not been reached to allow it to come into force. As was the case for its successors, the Convention and the Protocol, the biggest challenge of this agreement remains its limited number of state parties.

The link between IUU fishing and the safety of fishers working on board and forced labour has been acknowledged by the FAO Committee on Fisheries. There are two relevant agreements encompassing the connection those are: The Cape Town Agreement and the ILO Work in Fishing Convention Number 188.⁴⁹ Fishing operators who engage in illegal fishing are less likely to provide their crews with proper labour conditions, safety equipment or training. They are inclined to have inadequate modifications and their vessels often lack inspection or safety certifications in order to reduce operational costs.⁵⁰ Fiercer competition amongst vessel owners due to declining fish stocks may undermine fishers' safety.⁵¹ As such, it is in Indonesia's interest to consent to the Cape Town Agreement for the following reasons:

1. The Cape Town Agreement as one of safety at sea instruments carries the potential to improve the transparency of the identity of fishing vessels, ownership and movement since it could serve as a means to extend the IMO identification number and automatic identification system on fishing vessels.⁵² Therefore, this Agreement can be used as a tool to have more control over Indonesian fishing vessels when

⁴⁶ *The 2012 Cape Town Agreement on the Implementation Agreement of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977*, opened for signature at the Headquarters of the Organization from 11 February 2013 to 10 February 2014 and shall thereafter remain open for accession (not yet in force) art 4.

⁴⁷ Ministry of Transport of New Zealand, "Cape Town Agreement," 3

⁴⁸ Committee on Fisheries of Food and Agriculture Organization, "Safety at Sea in the Fisheries Sector," 33rd Session, COFI/2018/Inf.8 (April 2018) <<http://www.fao.org/3/MW946EN/mw946en.pdf>> 3.

⁴⁹ The South Pacific Regional Environment Programme, *The Cape Town Agreement on the Safety of Fishing Vessels at Centre of Pacific Islands Gathering* (29 August 2017) <<https://www.sprep.org/news/cape-town-agreement-safety-fishing-vessels-centre-pacific-islands-gathering>>.

⁵⁰ The PEW Charitable Trusts, "The Cape Town Agreement Explained," 2.

⁵¹ ILO, *Caught at Sea*, 6;

⁵² The PEW Charitable Trusts, "The Cape Town Agreement Explained," 3.

operating on the high seas.

2. In its thirty-first session, the Committee on Fisheries of FAO decided that the Cape Town Agreement was to become a significant instrument to eliminate IUU fishing due to the fact that the fishing vessels of member countries, as part of the Agreement, would fall under the ambit of Port State Control (PSC).⁵³
3. By agreeing to be bound by the Cape Town Agreement, Indonesia can use the Agreement to complement the Port State Measure Agreement (PSMA), to which Indonesia is a State Party (Presidential Regulation Number 43/2016), being an instrument to curb illegal fishing through having the authority to conduct inspection at ports.
4. The 2012 Cape Town Agreement can be utilized to force fishing vessels to abide by the rules of the Agreement, thus taking into account a growing concern about “human trafficking, including severe violation of minimal working and living conditions, on board fishing vessels”.⁵⁴

Despite the fact that consent by countries to the Cape Town Agreement has so far failed to reach the minimum 22 countries required for it to enter into force, Indonesia still needs to strengthen its leadership role in combating IUU fishing and transnational organized crime in the fisheries sector by ratifying the Agreement.

IV. LEGAL ISSUES AND CHALLENGES

A. LEGAL ISSUES

In general, the Fisheries Law can impose severe imprisonment sentences and fines for individuals and corporations engaged in IUU fishing. However, according to Gregory Rose, relevant domestic laws and regulations under MMAF do not address transnational criminal activities in fisheries.⁵⁵ In the Fisheries Law, the criminal act is divided into crime and offense.⁵⁶ Those com-

⁵³ Committee on Fisheries of Food and Agriculture Organization, *Safety at Sea in the Fisheries Sector*, 31st Session, COFI/2014/Inf.14 (March 2014), <http://www.fao.org/3/a-mk073e.pdf>, 3-4.

⁵⁴ Emma Witbooi, “Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context,” *The International Journal of Marine and Coastal Law* 29 (2014): 296.

⁵⁵ Gregory Rose, “Combating Transnational Environmental Crime: Future Direction” in *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre*, Gregory Rose, ed. (Routledge, 2014) 104.

⁵⁶ *Undang-Undang Perikanan Nomor 31 tahun 2004 sebagaimana diubah dengan Undang-Undang Nomor 45 tahun 2009 tentang Perikanan* [Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries] (Indonesia) art 103 [author’s trans] (‘Indonesia Fisheries Law’).

mitting a crime will be treated as criminals with a minimum of four years' imprisonment and a heavy fine. For example, a minimum five years' imprisonment and a maximum IDR 2 billion is the penalty for those practicing unsustainable fishing gears.⁵⁷ If it falls under the category of an offense, there is an imposition of a maximum two years imprisonment and/or a lesser fine than that imposed under the category of a crime. Those provisions apply to crimes undertaken in the Internal Waters, Archipelagic Waters and Territorial Sea of Indonesia. In respect of law enforcement in the Indonesia's Exclusive Economic Zone (EEZ), imprisonment will not be imposed, unless a bilateral agreement is concluded between Indonesia and relevant states.⁵⁸

Moreover, in the Fisheries Law, some provisions to curb IUU fishing are found, such as the prohibition of unsustainable fishing gears.⁵⁹ A licensing system comprising a License for Fishing (SIPI) and a License for Fish Transporting Vessels (SIKPI) is mandatory with the exception of small-scale fishers.⁶⁰ A main focus of the MMAF policy in addressing IUU fishing is the more stringent measures applied through the authority for the Fisheries Civil Servant Investigators, Navy Investigators and/or Police Investigators⁶¹ to undertake decisive measures by burning and/or sinking foreign fishing vessels based on sufficient preliminary evidence.⁶² In the elucidation section of the Fisheries Law, this evidence refers to the initial finding to suspect that criminal act in fisheries has been committed by foreign fishing vessels. This provision shows that distinctive measure cannot be undertaken irresponsibly, but it can be imposed only if the investigator and/or the fisheries surveillance offices have strong grounds that the suspected fishing vessels commit crimes in the fisheries, including unsustainable fishing gears and other criminal acts contributing IUU fishing regulated under the Fisheries Law.

While the Fisheries Law covers mostly fishery aspects, Law Number 32/2014 on the Ocean governs any issues related to the maritime affairs. In this law, the issues of IUU fishing and fisheries crimes are not addressed explicitly. Nevertheless, this law provides for both central and local governments along with any respective authority to undertake marine management measures to their best extent in terms of the people's prosperity through the utilization of marine resources by adopting the blue economy principle. This encompasses coastal and small island resources as well as the fisheries sector.⁶³ The con-

⁵⁷ *Ibid* art 85.

⁵⁸ *Ibid* art 102.

⁵⁹ *Ibid* art 9.

⁶⁰ *Ibid* arts. 27 & 28.

⁶¹ *Ibid* art 73.

⁶² *Ibid* art 63(4).

⁶³ *Ibid.*, art 14.

sideration of people's prosperity in this regulation is in line with the principle stated in Article 33(3) of the 1945 Constitution. Indonesia's decisive policy to espouse this blue economy concept contributes to the long-term use of ocean in the future since the core of blue economy is sustainability⁶⁴ and a sustainable blue economy encompasses not only economic but also social advantages for current and future generations.⁶⁵

Palma (2014) observes legal measures to curb fisheries crime include such efforts as defining activities categorized as fisheries crime, incorporating clauses pertaining to illegal acts as part of fisheries laws and regulations, and/or revising relevant laws and regulations regarding crime linked to fisheries legislation, and thus link it "as predicate offense to money laundering".⁶⁶ This sort of offense is defined as any offense whose proceeds may become the subject of money laundering offenses as defined under the United Nations Convention against Transnational Organized Crime (UNTOC) (UNTOC, art. 2(h)). The connection between criminal acts in the marine and fisheries sector as a predicate offense to money laundering is provided under the domestic legal framework through Law Number 8/2010 concerning Countermeasures and Eradication of Money Laundering.

Law Number 8/2010 connects money laundering with assets acquired from various criminal acts, including marine and fishery or other criminal actions that are punishable by imprisonment for four years or more.⁶⁷ Criminal acts listed in Article 2 of Law Number 8/2009 are intended to conform with Article 6 (2)(b) of the Palermo Convention. Even though the application of the money laundering law provision, in particular when committed in marine and fishery activities, needs further testing as assets generated from crimes in fisheries have never proceeded to money laundering case,⁶⁸ the connection may pave the way in combatting fisheries crimes within the milieu of trans-

⁶⁴ Economist Intelligence Unit, *The Blue Economy: Growth, Opportunity and a Sustainable Ocean Economy*. Briefing paper for the World Ocean Summit 2015 (2015) <https://eiu Perspectives.economist.com/sites/default/files/images/Blue%20Economy_briefing%20paper_WOS2015.pdf> 7.

⁶⁵ Neera Verma, 'Integrating a Gender Perspective into the Blue Economy' in *The Blue Economy Handbook of the Indian Ocean Region* V. N. Attri & N. Bohler-Muller, eds. (Africa Institute of South Africa, 2018), 104.

⁶⁶ Mary Anne Palma, "Fisheries Crime: Bridging the Conceptual Gap and Practical Response," *Centre for International Maritime Security*, 30th July 2014, retrieved from <http://cimsec.org/fisheries-crime-bridging-conceptual-gap-practical-response/12338>.

⁶⁷ Indonesia, *Undang-Undang Nomor 8 tahun 2011 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang* [Law No. 8/2010 on Countermeasures and Eradication of Money Laundering] (Indonesia) art 2 [author's trans] ('Indonesia Money Laundering Law').

⁶⁸ Fajar Pebrianto and Yudono Yanuar, "KKP Keluhkan Pasal Pencucian Uang Belum Jerat Illegal Fishing [MMAF is Deeply Concerned that Money Launder Provision has never been Applied to Illegal Fishing]," *Tempo Online*, 12 December 2017, <https://bisnis.tempo.co/read/1041413/kkp-keluhkan-pasal-pencucian-uang-belum-jerat-illegal-fishing/full&view=ok>.

national crime.

As asserted by Palma, organized crimes in most countries merely involve the predicate offenses of drug trafficking, trafficking in people, weapons smuggling, goods smuggling, piracy, armed robbery and terrorism, and occasionally illegal logging. She claims that the Philippines is the only state that has adopted fisheries breaches as predicate offenses for transnational crimes. In its anti-money laundering regulation of Republic Act 10365, which amended Republic Act 9160, it is possible for related authorities of the Philippines to freeze, seize, recover money from the proceeds of crime, cooperate with other countries, create financial intelligent units, require customer identification, keep records of and report suspicious transactions. By possessing such authority, it is possible to trace the proceeds of fisheries crimes in the Philippines.⁶⁹ However, contrary to Palma's assertion, Indonesia can in fact apply the same measures as the Philippines in addressing fisheries crimes with the adoption of Law Number 8/2010.

B. CHALLENGES

The nexus between IUU fishing and TOC is an interesting subject since there exists conflicting views pertaining to this matter amongst countries and further clarification is needed regarding the relationship between IUU fishing and TOC. A critical aspect to the issue is that there is no standardized punishment for breaching fisheries regulations. Countries differ in terms of perceiving and sanctioning fisheries poaching. Some consider them as criminals, while others charge them with an administrative penalty, or indeed both.⁷⁰ In the case of Indonesia, Law number 31/2004 as amended by Law Number 45/2009 concerning Fisheries provides both administrative and criminal sanctions for IUU fishing perpetrators.

It is important to note when considering the connection between domestic legal frameworks and international legal instruments concerning IUU fishing and TOC, the main reference is the UNTOC. Serious crime is defined as "conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".⁷¹ It is conceived as

⁶⁹ Mary Ann Palma, "Tightening the Net: The Legal Link between Illegal, Unreported and Unregulated Fishing and Transnational Organized Crime under International Law" *Ocean Yearbook* 29 (2015): 164.

⁷⁰ Mary Ann Palma, Martin Tsamenyi and Bill Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers, 2010) 262.

⁷¹ *United Nations Convention against Transnational Organized Crime*, art. 2. It opened for signature 12 to 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) ('Transnational Organized Crime Convention'). It comprises 3 (three) protocols: 1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 12 to 15 December 2000, 2237 UNTS 139 (entered

“transnational in nature” if:⁷²

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

The definition of “organized criminal group” and “serious crime” as well as conditions for “transnational in nature” constitute the most important reference of the TOC. Telesetsky highlighted that there are two sorts of crime in Article 2 of the UNTOC: particular transnational crimes encompassing “organized criminal group”, and “serious crime” encompassing “organized criminal group”. She was of the view that IUU fishing activities involving a minimum of three individuals would be regarded as an “organized criminal group” as referred to in UNTOC.⁷³

In assessing IUU fishing and fisheries crime as TOC, there are several aspects to consider. Under the Palermo Convention, three main factors are involved: organized crime; serious crime; and crimes that are transnational in nature. Obviously, IUU fishing and fisheries crime can only be executed by three or more persons as these activities usually involve big business. IUU fishing activity is also transnational in nature as persons committing these actions will be border-crossing when achieving their goals and causing depredation to other countries. In Indonesia, IUU fishing is also undertaken by vessels flying foreign flags. However, to conform to the category of organized crime, there should be an aspect of ‘serious crime’.

The definition of serious crime under the Palermo Convention generates different responses from countries. This distinction leads several countries to hesitate from including IUU fishing as TOC under the Convention. This distinction arises as such countries view IUU fishing as needing to be treated from a fisheries management perspective. One such instance is the policy of Norway. At the inaugural fisheries crime symposium in 2015, that view came

into force 25 December 2003), 2. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 12 to 15 December 2000, 2241 UNTS 507 (entered into force 28 January 2004), 3. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature on 2 July 2011, 2326 UNTS 208 (entered into force 3 July 2005).

⁷² *Transnational Organized Crime Convention* art. 3.

⁷³ Telesetsky, “Laundering Fish in the Global Undercurrents,” 966. The article tests a legal framing theory by arguing that insufficient attention has been given to understanding large-scale IUU fishing as a transnational organized criminal activity.

from the Tor Martin Møller as representative of the Norwegian Ministry of Trade, Industry and Fisheries. He reaffirmed Norway's commitment to fight fisheries crimes and to treat illegal fishing as a TOC. Norway promoted two approaches: fighting against IUU fishing with administrative sanctions; and combatting fisheries crimes through criminal sanctions.⁷⁴ From this perspective, there is a clear discrepancy between IUU fishing and fisheries crimes in terms of prevailing legal and policy instruments leading to the imposition of sanctions. In this sense, IUU fishing is not deemed to be a crime and therefore, it should be addressed under civil law. However, when it comes to fisheries crimes, criminal law should be applied to combat such unlawful activities.

Another example is South Africa. In its regulations, the breaching of most provisions of the Marine Living Resources Act (MLRA) of 1998 incurs a criminal offense punishable by a maximum of two years imprisonment and a maximum fine of ZAR 2 million. Some offenses in fisheries such as "prohibited gear, interference with and storage of gear and the use of driftnet" are treated under administrative law and incur no imprisonment.⁷⁵ Seemingly, the South African Government has a different approach to the legal framework in terms of addressing IUU fishing and fisheries crimes.

In comparison, within the context of Indonesia's legal instrument, the Fisheries Law has sanctions of a fine and/or imprisonment depending on which category, that is, whether it is an offense or a crime. Nonetheless, most unlawful acts are considered as crimes with a minimum of four years imprisonment and a severe fine. This four-year imprisonment term complies with the definition of "serious crime" in the Palermo Convention. The Money Laundering Law has also provided the possibility to trace, seize, and take other relevant measures to bring before the court any crimes and offenses as predicate offense from marine and fisheries activities.

From the above discussion, some challenges for the future can be drawn:

First, perceptions, practices, approaches and the domestic legal system vary between states in observing and addressing IUU fishing, fisheries management, and fisheries crimes. It is also worth noting that unregulated fishing for some countries is not regarded as a crime since fishing in areas or for fish stocks for which there are no applicable conservation or management measures, does not constitute a breach of the law. Although this is a fundamental concept, the distinction should not undermine current measures to revive de-

⁷⁴ Stop Illegal Fishing and PescaDOLUS, *Record of the First International Symposium on Fish Crime* (The Norwegian Ministry of Trade, Industry and Fishing, 2016), 5.

⁷⁵ Eva de Coning and Emma Witbooi, "Towards a new 'Fisheries Crime' Paradigm: South Africa as an Illustrative Example," *Marine Policy* 60 (2015): 211.

pleted fish stocks, to combat crimes occurring along the value chain of fisheries, and to address unsustainable practices in the global marine ecosystem.

Second, even though relevant Indonesian domestic laws and regulations particularly Fisheries Law and anti-money laundering law have complied with the provisions of UNTOC for IUU fishing to be TOC, there are some legal loopholes to be addressed. In Fisheries Law and Law Number 32/2014 concerning the Ocean, no definition of IUU fishing is found. The only definition that refers explicitly to activities of IUU Fishing as set out in International Plan of Action on IUU Fishing adopted in the national document can be found in Indonesia National Plan of Action to Prevent and to Combat IUU Fishing 2012-2016.⁷⁶ However, this document has expired in 2016. Moreover, although elements of fisheries crimes are also regulated in the Fisheries Law, the connection between the crimes and TOC is not provided.

Third, the international community has various terms in addressing fisheries poaching even though the goals may differ. The most familiar terms would not be IUU fishing *per se*, but could refer to transnational organized fisheries crimes, fisheries-associated crimes and fisheries crimes. This dissimilarity emerges due to the lack of an agreed definition in an international legally binding agreement that could be referred to as a common starting point. Those three terms share the same notion in that fisheries poaching encompasses the other transnational crimes. However, those terms leave unanswered the question concerning the best term to be used.

Fourth, a further loophole is that Indonesia has not consented to be bound by the 1993 FAO Compliance Agreement and the 2012 Cape Town Agreement. Those Agreements are of the utmost importance in combatting IUU fishing and its relationship to TOC. This can be understood since TOC practices such as drugs, weapons, and other illicit goods are present on the high seas.⁷⁷ Flag states can be used to probe the possible linkage between TOC and IUU fishing while the goods resulting from such illegal activities can be traced and forbidden to be exported and imported.⁷⁸

C. Proposed Measures

Given the above-mentioned challenges, several measures are proposed:

⁷⁶ MMAF, *National Plan of Action on IUU Fishing* (Director General of Surveillance or Marine and Fisheries Resources and Japan International Cooperation Agency, 2012) <<http://extwprlegs1.fao.org/docs/pdf/ins165159.pdf>> 14-15.

⁷⁷ Nicola Berkovic, 'Call for New Powers to Deal with Organised Crime on High Seas,' *The Australian* (online), 24 April 2015 <<http://www.theaustralian.com.au/national-affairs/call-for-new-powers-to-deal-with-organised-crime-on-high-seas/story-fn59niix-1227317735345?sv=58400ab71f725add3dc0ee80f3a1a2cc>>

⁷⁸ Palma, Tsamenyi and Edeson, above n 66, 5.

First, while states attempt to discover the best formula to accommodate discrepancies between fisheries management and crimes in viewing IUU fishing and fisheries crimes, it is important to stress that both IUU fishing and fisheries crimes are regarded as having a connection with other criminal offenses and are generally transnational, largely organized, and can have severe adverse social, economic and environmental impacts both domestically and internationally. Moreover, fisheries crime is part of IUU fishing. Therefore, the terms of IUU fishing and fisheries crimes should both be used in international forums.

Second, in responding to current dynamics, it is necessary for the Indonesian Government to review and amend the existing legal frameworks on fisheries, particularly the Fisheries Law. The said law should define IUU fishing in the article regulating the definition. It is also possible to consider providing a definition of fisheries crimes. Another option to be considered is that the MMAF can propose a specific law or regulation concerning IUU fishing as a *lex specialis* to the Law on Fisheries. In the proposed law or regulation, fisheries crimes that are transnationally organized should be provided for.

Third, in determining the most appropriate term to be used between transnational organized fisheries crimes, fisheries-associated crimes and fisheries crimes, there is a solution offered to this issue. In February 2016, the UNODC and World Wildlife Fund (WWF) co-organized an Expert Group Meeting on Fisheries Crime in Vienna. In this forum, fisheries crime was defined as “a serious offense within the fisheries resource sector that takes place along the entire food products supply chains and associated value chains, extending into the trade, ownership structures and financial services sectors”. Nevertheless, the “serious” term is not associated with the definition found in the UNTOC. It is instead meant to have an extensive impact on the community.⁷⁹ It seems that the panel of experts offered a solution on the scope of fisheries crimes. Although this is still a working document, this consensus may pave the way for states as a reference when formulating a possible international agreement or domestic regulation.

Fourth, it is important for the Government of Indonesia to consent to be bound by the 1993 FAO Compliance Agreement and the 2012 Cape Town Agreement. By expressing its consent to ratify, accept or approve the Compliance Agreement, Indonesia may benefit from international cooperation and exchange of information established under this agreement. Meanwhile, if Indonesia becomes a State Party to the Cape Town Agreement, its fishing ves-

⁷⁹ *Outcome of the UNODC/WWF Fisheries Crime Expert Group Meeting 2016*, Commission on Crime Prevention and Criminal Justice, 25th sess, E/CN.14/2016/CRP.2 (11 May 2016) 3.

sels may be prevented from engaging in IUU fishing and committing transnational crimes on the high seas.

V. CONCLUSION

The 1945 Constitution has provided a role of the state to benefit the Indonesian people with regard to natural resource management. Under the Constitution, there are several primary laws concerning IUU fishing and Fisheries Crimes such as the Fisheries Law, Law No. 32/2014 on the Ocean and the Money Laundering Law. One of the ultimate objectives of the Fisheries Law is overcoming IUU fishing. In this Law, criminal acts are classified as being either a crime or an offense. The minimum punishment for criminal acts is four years, while for an offense the maximum is two years. Some provisions to curb IUU fishing are found in this law. Meanwhile, Law Number 32/2014 does not explicitly cover issues of IUU fishing and TOFC. After ratifying UN-TOC, Indonesian authorities agreed to adopt the Money Laundering Law. The connection between criminal acts in marine and fisheries and predicate offenses are provided in this law.

From a legal perspective, gaps persist in Indonesia's legislation regarding IUU fishing and its connection with fisheries crime transnationally organized.

1. Relevant domestic laws and regulations under MMAF do not directly address transnational criminal activities in fisheries. The Fisheries Law also does not define IUU fishing and fisheries crimes.
2. Furthermore, in the international community, perceptions regarding identifying and imposing the breach on fisheries regulations differ. Some countries view perpetrators as criminals, while others treat them under civil law.
3. Moreover, various terms to address fisheries poaching such as TOFC, fisheries-related crime, and fisheries crime, as legal definitions of fisheries crime, are not provided in an international legally binding instrument.
4. Indonesia is not a state party to the FAO Compliance Agreement and the Cape Town Agreement.

Several proposals can be considered to combat IUU fishing and fisheries crimes transnationally organized within the scope of the domestic legal framework, as follows:

1. IUU fishing and fisheries crimes should both be used in international forums;

2. It is necessary to review and amend the existing legal framework on fisheries, particularly Fisheries Law. This law should explain the activities of IUU fishing. It is also possible to consider relating it to the TOC.
3. Indonesia should consent to be bound by the 1993 FAO Compliance Agreement and the 2012 Cape Town Agreement.

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